

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

4 UNITED STATES OF AMERICA, - Docket No. 3:10-cr-522
-
5 Plaintiff, - Toledo, Ohio
- September 6, 2011
6 v. - Trial
-
7 ALEX DAVID COOK, -
-
8 Defendant. -

VOLUME 1

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE JAMES G. CARR
UNITED STATES DISTRICT JUDGE, AND A JURY

12 APPEARANCES:

13 For the Plaintiffs: United States Attorneys' Office
14 By: Thomas O. Secor
15 Gene Crawford
Four SeaGate, Suite 308
Toledo, OH 43604
(419) 259-6376

For the Defendant: Elizabeth Kelley
17 Suite 285
18 13938 A Cedar Road
Cleveland, OH 44118-3204
(216) 410-6923

Court Reporter: Tracy L. Spore, RMR, CRR
20 1716 Spielbusch Avenue
21 Toledo, Ohio 43624
 (419) 213-5520

Proceedings recorded by mechanical stenography,
transcript produced by notereading.

1 (Commenced at 2:06 p.m.)

2 (The jury is not present.)

3 THE COURT: If there's something I misread,
00:00:05 4 interrupt and say, Judge, may we approach. I did a lot
00:00:10 5 less editing than I usually do.

6 MR. SECOR: The only thing I'd indicate,
00:00:12 7 Your Honor, is in the charge that Amy was kind enough to
00:00:19 8 send to us, 7.20, statement by the defendant, had been
00:00:32 9 left out. I assume that you left that out only because
00:00:37 10 you were uncertain at the time whether or not the
00:00:40 11 defendant intended to testify.

12 THE COURT: I did.

13 MR. SECOR: It's back in.

14 THE COURT: I'm looking at the unnumbered
00:00:54 15 pages. I hope they got the right -- and that comes just
00:01:14 16 before deliberation and verdict. I can stop there. I
00:01:17 17 can stop with page 29 -- or, I'm sorry, I can stop with
00:01:23 18 page 27 and not read further. I don't read the business
00:01:32 19 about verdict and so forth in any event.

20 MR. SECOR: My point is that under United
00:01:53 21 States versus Adams, it was a Sixth Circuit case --

22 THE COURT: My point is if I simply postpone
00:02:00 23 that issue by stopping my reading at page 27, First
00:02:05 24 Amendment --

25 MR. SECOR: Yes.

00:02:08 1 THE COURT: We'll deal with it in due
00:02:09 2 course. Okay, Ms. Kelley?

00:02:18 3 MS. KELLEY: Nothing further.

00:02:19 4 THE COURT: Work for you if we do that?

00:02:20 5 MS. KELLEY: Yes.

00:02:23 6 THE COURT: Thanks, Mr. Secor.

00:02:26 7 (The jury enters the courtroom.)

00:03:22 8 THE COURT: Ladies and gentlemen, you've
00:03:25 9 been given a set of jury instructions which I will read
00:03:28 10 to you in a moment. Please do not read ahead. You
00:03:32 11 don't have to refer to them as I'm reading; it's up to
00:03:38 12 you. You can make whatever marks you want on the
00:03:40 13 instructions, although they will be collected after I
00:03:43 14 conclude reading them. At the end of the trial I will
00:03:46 15 read you my final instructions. I anticipate but cannot
00:03:51 16 be certain that they will duplicate almost substantially
00:03:58 17 if not completely the instructions that I'll read you in
00:04:01 18 a moment. But on the other hand, sometimes things occur
00:04:04 19 during trial which necessitate a change in the final
00:04:07 20 instructions that I gave you before you begin
00:04:11 21 deliberations. Which is to say these instructions are
00:04:14 22 not your final guidance on what the law is and the law
00:04:20 23 that you shall follow in reaching your deliberations.
00:04:23 24 My purpose in giving jury instructions to you at this
00:04:27 25 time is to give you some sense of what's going on, what

00:04:32 1 you have to do, what you have to decide, and to some
00:04:35 2 extent how you should go about deciding. The
00:04:40 3 instructions I'm only going to read up through page 27.
00:04:47 4 The other instructions deal with verdicts and so forth,
00:04:50 5 so I will not be reading them, nor should you read them
00:04:54 6 now or anytime during the course of my reading of these
00:04:57 7 instructions to you.

00:05:00 8 I do ask that you simply follow along and do
00:05:03 9 not read ahead. So if you'll turn to the first page.

00:05:18 10 (Discussion had off the record.)

00:05:18 11 (Jury is sworn by the clerk.)

00:05:27 12 THE COURT: Now you may be seated. Now you
00:05:30 13 may turn to the first page.

00:05:42 14 General principles, introduction.

00:05:45 15 Members of the jury, now it is time for me
00:05:48 16 to instruct you about the law that you must follow in
00:05:51 17 deciding this case.

00:05:52 18 I will start by explaining your duties and
00:05:55 19 the general rules that apply in every criminal case.

00:05:58 20 Then I will explain the elements, or parts,
00:06:01 21 of the crimes that the defendant is accused of
00:06:05 22 committing.

00:06:05 23 Then I will explain some rules that you must
00:06:08 24 use in evaluating particular testimony.

00:06:12 25 And number five, I am not going to give you

00:06:15 1 that portion about what you do in the jury room. That
00:06:18 2 comes later.

00:06:22 3 Please listen very carefully to everything I
00:06:24 4 say. Likewise, be attentive throughout the trial to the
00:06:29 5 testimony and other evidence, statements, and arguments
00:06:32 6 by counsel, and my further instructions. You cannot
00:06:36 7 anticipate that you will be able to have any portion of
00:06:39 8 the testimony read back to you during deliberations,
00:06:43 9 although the exhibits will be with you in the jury room.

00:06:49 10 Jurors' duties.

00:06:51 11 You have two main duties as jurors. The
00:06:54 12 first is to decide what the facts are from the evidence
00:06:58 13 that you see and hear in court. Deciding what the facts
00:07:02 14 are is your job, not mine, and nothing that I have said
00:07:08 15 or done during this trial or will say or do during the
00:07:11 16 trial was or is meant to influence your decision about
00:07:14 17 the facts in any way.

00:07:18 18 Your second duty is to take the law that I
00:07:21 19 give you, apply it to the facts, and decide if the
00:07:25 20 government has proved the defendant guilty beyond a
00:07:28 21 reasonable doubt. It is my job to instruct you about
00:07:32 22 the law, and you are bound by the oath that you took at
00:07:36 23 the beginning of the trial to follow the instructions
00:07:39 24 that I give you, even if you personally disagree. This
00:07:45 25 includes the instructions that I give you before and

00:07:47 1 during the trial, and these instructions. All
00:07:50 2 instructions are important, and you should consider them
00:07:54 3 together as a whole.

00:07:55 4 The lawyers will talk about the law during
00:08:00 5 their opening statements and closing arguments. If what
00:08:05 6 they say differs from what I say, you must follow what I
00:08:09 7 say about the law. What I say about the law controls.

00:08:14 8 Perform these duties fairly. Do not let any
00:08:21 9 bias, sympathy, or prejudice that you may feel toward
00:08:24 10 one side or the other influence your decision in any
00:08:31 11 way.

00:08:31 12 Presumption of innocence, burden of proof,
00:08:36 13 reasonable doubt.

00:08:38 14 As you know, the defendant has pleaded not
00:08:40 15 guilty to the crimes charged in the indictment. The
00:08:44 16 indictment is not any evidence at all of guilt. It is
00:08:49 17 just the formal way that the government tells the
00:08:52 18 defendant what crimes he is accused of committing. It
00:08:56 19 does not even raise any suspicion of guilt.

00:08:59 20 Instead, the defendant starts the trial with
00:09:04 21 a clean slate, with no evidence at all against him, and
00:09:08 22 the law presumes that he is innocent. This presumption
00:09:13 23 of innocence stays with the defendant unless the
00:09:17 24 government presents evidence here in court that
00:09:19 25 overcomes the presumption, and convinces you beyond a

00:09:24 1 reasonable doubt that he is guilty.

00:09:26 2 This means that the defendant has no
00:09:32 3 obligation to present any evidence at all, or to prove
00:09:35 4 to you in any way that he is innocent. It is up to the
00:09:38 5 government to prove that he is guilty, and this burden
00:09:41 6 stays on the government from start to finish. You must
00:09:45 7 find the defendant not guilty unless the government
00:09:49 8 convinces you beyond a reasonable doubt that he is
00:09:53 9 guilty.

00:09:53 10 The government must prove every element of
00:09:57 11 the crimes charged beyond a reasonable doubt. Proof
00:10:02 12 beyond a reasonable doubt does not mean proof beyond all
00:10:05 13 possible doubt. Possible doubts or doubts based purely
00:10:10 14 on speculation are not reasonable doubts. A reasonable
00:10:14 15 doubt is a doubt based on reason and common sense. It
00:10:19 16 may arise from the evidence, the lack of evidence, or
00:10:23 17 the nature of the evidence.

00:10:25 18 Proof beyond a reasonable doubt means proof
00:10:29 19 which is so convincing that you would not hesitate to
00:10:33 20 rely and act on it in making the most important
00:10:36 21 decisions in your own lives. If you are convinced that
00:10:40 22 the government has proved the defendant guilty beyond a
00:10:47 23 reasonable doubt, say so by returning a guilty verdict.
00:10:49 24 If you are not convinced, say so by returning a not
00:10:52 25 guilty verdict.

00:10:56 1 Evidence defined.

00:10:58 2 You must make your decision based only on

00:11:01 3 the evidence that you saw and heard here in court. Do

00:11:04 4 not let rumors, suspicions, or anything else that you

00:11:08 5 may have seen or heard outside of court influence your

00:11:11 6 decision in any way.

00:11:14 7 The evidence in this case includes only what

00:11:18 8 the witnesses say while they are testifying under oath,

00:11:23 9 the exhibits that I allow into evidence, any

00:11:26 10 stipulations that the lawyers agree to, and the facts

00:11:30 11 that I have judicially noticed, if any.

00:11:33 12 Nothing else is evidence. The lawyers'

00:11:38 13 statements and arguments are not evidence. Their

00:11:41 14 questions and objections are not evidence. It is the

00:11:45 15 answers to those questions that are evidence. My legal

00:12:03 16 rulings are not evidence, and any comments by me and

00:12:06 17 questions by me are not evidence.

00:12:10 18 During the trial I will not let you hear the

00:12:13 19 answers to some of the questions that the lawyers ask.

00:12:17 20 I will also rule from time to time that you could not

00:12:19 21 see some of the exhibits that the lawyers wanted you to

00:12:22 22 see -- or at least I may do so. Sometimes I may order

00:12:27 23 you to disregard things that you saw or heard, orally

00:12:30 24 strike things from the record. You must completely

00:12:33 25 ignore all of these things. Do not even think about

00:12:37 1 them. Do not speculate about what a witness might have
00:12:41 2 said or what an exhibit might have shown. These things
00:12:45 3 are not evidence, and you are bound by your oath not to
00:12:48 4 let them influence your decision in any way. Make your
00:12:53 5 decision based only on the evidence, as I have and will
00:12:57 6 define it here, and nothing else.

00:13:05 7 Consideration of the evidence. You should
00:13:08 8 use your common sense in weighing the evidence.
00:13:10 9 Consider it in light of your everyday experience with
00:13:12 10 people and events, and give it whatever weight you
00:13:15 11 believe it deserves. If your experience tells you that
00:13:19 12 certain evidence reasonably leads to a conclusion, you
00:13:23 13 are free to reach that conclusion.

00:13:29 14 Direct and circumstantial evidence.

00:13:32 15 You may have heard the terms "direct
00:13:34 16 evidence" and "circumstantial evidence."

00:13:37 17 Direct evidence is simply evidence like the
00:13:40 18 testimony of an eyewitness which, if you believe it,
00:13:44 19 directly proves a fact. If a witness testified that he
00:13:49 20 saw it raining outside, and you believed him, that would
00:13:53 21 be direct evidence that it was raining.

00:13:57 22 Circumstantial evidence is simply a chain of
00:14:02 23 circumstances that indirectly proves a fact. If someone
00:14:07 24 walked into the courtroom wearing a raincoat covered
00:14:10 25 with drops of water and carrying a wet umbrella, that

00:14:14 1 would be circumstantial evidence from which you could
00:14:17 2 conclude that it was raining.

00:14:21 3 It is your job to decide how much weight to
00:14:24 4 give the direct and circumstantial evidence. The law
00:14:27 5 makes no distinction between the weight that you should
00:14:30 6 give to either one, or say that one is any better
00:14:33 7 evidence than the other. You should consider all the
00:14:36 8 evidence, both direct and circumstantial, and give it
00:14:40 9 whatever weight you believe it deserves.

00:14:45 10 Another part of your job as jurors is to
00:14:50 11 decide how credible or believable each witness was.
00:14:56 12 This is your job, not mine. It is up to you to decide
00:15:01 13 if a witness' testimony was believable, and how much
00:15:06 14 weight you think it deserves. You are free to believe
00:15:09 15 everything that a witness said, or only part of it, or
00:15:13 16 none of it at all. But you should act reasonably and
00:15:16 17 carefully in making these decisions.

00:15:20 18 Let me suggest some things for you to
00:15:22 19 consider in evaluating each witness' testimony.

00:15:26 20 Ask yourselves if the witness was able to
00:15:30 21 clearly see or hear the events. Sometimes even an
00:15:34 22 honest witness may not have been able to see or hear
00:15:37 23 what was happening, and may make a mistake.

00:15:41 24 Ask yourself how good the witness' memory
00:15:45 25 seemed to be. Did the witness seem able to accurately

00:15:49 1 remember what happened?

00:15:51 2 Ask yourself if there was anything else that
00:15:55 3 may have interfered with the witness' ability to
00:15:58 4 perceive or remember the events.

00:16:01 5 Ask yourself how the witness acted while
00:16:04 6 testifying. Did the witness appear honest? Or did the
00:16:08 7 witness appear to be lying?

00:16:11 8 Ask yourself if the witness had any
00:16:14 9 relationship to the government or the defendant, or
00:16:17 10 anything to gain or lose from the case, that might
00:16:21 11 influence the witness' testimony. Ask yourself if the
00:16:25 12 witness had any bias, or prejudice, or reason for
00:16:29 13 testifying that might cause the witness to lie or to
00:16:33 14 slant the testimony in favor of one side or the other.

00:16:41 15 Ask yourself if the witness testified inconsistently
00:16:45 16 while on the witness stand, or if the witness said or
00:16:48 17 did something or failed to say or do something at any
00:16:51 18 other time that is inconsistent with what the witness
00:16:54 19 said while testifying. If you believe that the witness
00:16:59 20 was inconsistent, ask yourself if this makes the
00:17:02 21 witness' testimony less believable. Sometimes it may;
00:17:07 22 other times it may not. Consider whether the
00:17:10 23 inconsistency was about something important, or about
00:17:15 24 some unimportant detail. Ask yourself if it seemed like
00:17:20 25 an innocent mistake, or if it seemed deliberate.

00:17:25 1 And ask yourself how believable the witness'
00:17:28 2 testimony was in light of all the other evidence. Was
00:17:32 3 the witness' testimony supported or contradicted by
00:17:35 4 other evidence that you found believable? If you
00:17:40 5 believe that a witness' testimony was contradicted by
00:17:43 6 other evidence, remember that people sometimes forget
00:17:47 7 things, and that even two honest people who witness the
00:17:51 8 same event may not describe it in exactly the same way.

00:17:56 9 These are only some of the things that you
00:17:59 10 may consider in deciding how believable each witness
00:18:01 11 was. You may also consider other things that you think
00:18:06 12 shed some light on the witness' believability. Use your
00:18:09 13 common sense and your everyday experience in dealing
00:18:13 14 with other people, and then decide what testimony you
00:18:17 15 believe, and how much weight you think it deserves.

00:18:25 16 Number of witnesses.

00:18:27 17 One more point about the witnesses.

00:18:29 18 Sometimes jurors wonder if the number of witnesses who
00:18:32 19 testified makes any difference.

00:18:34 20 Do not make any decision based only on the
00:18:37 21 number of witnesses who testified. What is more
00:18:39 22 important is how believable the witnesses were, and how
00:18:43 23 much weight you think their testimony deserves.

00:18:46 24 Concentrate on that, and not on the number.

00:18:53 25 Lawyers' objections.

00:18:55 1 There is one more general subject that I
00:18:57 2 want to talk to you about before I begin explaining the
00:19:00 3 elements of the crimes charged.

00:19:02 4 The lawyers on both sides may object to some
00:19:05 5 of the things that were said or done during the trial.
00:19:09 6 Do not hold that against either side. The lawyers have
00:19:12 7 a duty to object whenever they think that something is
00:19:16 8 not permitted by the Rules of Evidence. Those rules are
00:19:19 9 designed to make sure that both sides receive a fair
00:19:23 10 trial.

00:19:23 11 And do not interpret my rulings on their
00:19:27 12 objections as any indication of how I think the case
00:19:30 13 should be decided. My rulings will be based on the
00:19:34 14 Rules of Evidence, not on how I feel about the case.
00:19:39 15 Remember that your decision must be based only on the
00:19:42 16 evidence that you saw and heard here in court.

00:19:49 17 Defining the crime and related matters:
00:19:57 18 Introduction.

00:19:58 19 That concludes the part of my instructions
00:20:01 20 explaining your duties and the general rules that apply
00:20:04 21 in every criminal case. In a moment, I will explain the
00:20:07 22 elements of the crimes that the defendant is accused of
00:20:09 23 committing.

00:20:10 24 But before I do so, I want to emphasize that
00:20:13 25 the defendant is on trial for only the particular crimes

00:20:16 1 charged in the indictment. Your job is limited to
00:20:19 2 deciding whether the government has proved each crime
00:20:22 3 charged -- any or each of the crimes charged.
00:20:28 4 Separate consideration, single defendant
00:20:32 5 charged with multiple crimes.
00:20:35 6 Mr. Cook has been charged with three crimes.
00:20:43 7 The number of charges is not evidence of guilt, and this
00:20:46 8 should not influence your decision in any way. It is
00:20:49 9 your duty to separately consider the evidence that
00:20:52 10 relates to each charge, and to return a separate verdict
00:20:56 11 for each one. For each charge, you must decide whether
00:21:01 12 the government has presented proof beyond a reasonable
00:21:03 13 doubt that Mr. Cook is guilty of that particular charge.
00:21:08 14 Your decision on one charge, whether it is
00:21:12 15 guilty or not guilty, should not influence your decision
00:21:14 16 on any other charge.
00:21:16 17 On or about. Next I want to say a word
00:21:26 18 about the dates mentioned in the indictment.
00:21:28 19 Count 1 of the indictment charges that the
00:21:31 20 crime happened from in or about May 2010 and continuing
00:21:40 21 until on or about September 5, 2010.
00:21:44 22 Count 2 of the indictment charges the crime
00:21:47 23 happened on or about June 22, 2010.
00:21:50 24 Count 3 of the indictment charges that the
00:21:52 25 crime happened on or about September 15, 2010.

00:21:57 1 The government does not have to prove that
00:22:01 2 the crimes happened on those exact dates. But the
00:22:04 3 government must prove that the crimes happened
00:22:07 4 reasonably close to those dates inferring required
00:22:14 5 mental state.

00:22:19 6 Next I want to explain about proving a
00:22:25 7 defendant's state of mind.

00:22:26 8 Ordinarily, there is no way that a
00:22:29 9 defendant's state of mind can be proved directly,
00:22:32 10 because no one can read another person's mind and tell
00:22:36 11 what that person is thinking.

00:22:37 12 But a defendant's state of mind can be
00:22:39 13 proved indirectly from the surrounding circumstances.
00:22:43 14 This includes things like what the defendant said, what
00:22:47 15 the defendant did, how the defendant acted, and any
00:22:51 16 other facts or circumstances in evidence to show what
00:22:55 17 was in the defendant's mind.

00:22:58 18 You may also consider the natural and
00:23:01 19 probable results of any acts that the defendant
00:23:05 20 knowingly did or did not do and whether it's reasonable
00:23:09 21 to conclude that the defendant intended those results.
00:23:13 22 This, of course, is all for you to decide. It is up to
00:23:17 23 you to decide what facts to find from the evidence
00:23:21 24 received during the trial.

00:23:26 25 The charges set forth in the indictment.

00:23:31 1 The defendant, Alex D. Cook, is charged with
00:23:37 2 one count of receipt of visual depiction of minors
00:23:41 3 engaged in sexually explicit conduct, in violation of
00:23:45 4 Title 18, United States Code, Section 2252(a)(2); one
00:23:50 5 count of distribution of child pornography, in violation
00:23:55 6 of Title 18, United States Code, Section 2252(a)(2); and
00:23:59 7 one count of possession of child pornography, in
00:24:01 8 violation of Title 18, United States Code, Section
00:24:04 9 2252(a)(4)(B).

00:24:08 10 Ladies and gentlemen, I should mention, it's
00:24:11 11 not my practice to read the indictment or have it go to
00:24:14 12 the jury. Rather, you can comment on the elements
00:24:18 13 during the course of the case and your arguments.

00:24:20 14 Please turn to page 19.

00:24:30 15 Charging statute, receiving and distributing
00:24:33 16 materials involving sexual exploitation of minors,
00:24:37 17 Section 2252(a)(2). The statute which is alleged to
00:24:43 18 have been violated in Counts 1 and 2 is Title 18, United
00:24:47 19 States Code, Section 2252(a)(2). As is relevant here,
00:24:51 20 that statute provides that: Subsection (a), a person
00:24:56 21 who, subsection (2), knowingly receives, or distributes
00:25:01 22 any visual depiction that has been mailed, or has been
00:25:04 23 shipped or transported in interstate or foreign
00:25:08 24 commerce.

00:25:08 25 The producing of said visual depiction

00:25:12 1 involves the use of a minor engaging in sexually
00:25:16 2 explicit conduct; and
00:25:17 3 (B) such visual depiction of such conduct
00:25:21 4 shall be guilty of a criminal offense against the United
00:25:28 5 States.

00:25:28 6 Elements of the offense, receiving and
00:25:31 7 distributing material involving sexual exploitation of
00:25:35 8 minors, 18 U.S. Code Section 2252(a)(2).

00:25:40 9 Title 18, United States Code, Section
00:25:42 10 2252(a)(2) makes it a federal crime or offense for any
00:25:47 11 person to knowingly receive or distribute any visual
00:25:51 12 depiction that has been shipped or transported in
00:25:54 13 interstate or foreign commerce by any means, including
00:25:58 14 by computer, if the production of such visual depiction
00:26:03 15 involved the use of a real minor engaging in sexually
00:26:07 16 explicit conduct and the visual depiction is of such
00:26:11 17 conduct.

00:26:11 18 Mr. Cook can be found guilty of that offense
00:26:15 19 only if all the following elements are proved beyond a
00:26:18 20 reasonable doubt:

00:26:18 21 First, that Mr. Cook knowingly received or
00:26:24 22 distributed a visual depiction.

00:26:25 23 Second, that such visual depiction was
00:26:30 24 shipped or transported in interstate or foreign commerce
00:26:32 25 by any means, including by computer.

00:26:35 1 Third, that the production of such visual
00:26:38 2 depiction involved the use of a real minor engaging in
00:26:42 3 sexually explicit conduct.

00:26:44 4 Fourth, that such visual depiction is of a
00:26:48 5 minor engaging in sexually explicit conduct; and

00:26:53 6 Fifth, that Mr. Cook knew that at least one
00:26:57 7 of the individuals in such visual depiction was a minor
00:27:01 8 and knew that the visual depiction was of such minor
00:27:05 9 engaging in sexually explicit conduct.

00:27:08 10 Now I will give you more detailed
00:27:10 11 instructions on some of these terms.

00:27:13 12 To receive a visual depiction means to take
00:27:18 13 possession of it. This includes the knowing acceptance
00:27:21 14 of a depiction previously requested.

00:27:24 15 Receiving includes the downloading of a
00:27:27 16 photograph or video by means of the internet.

00:27:32 17 To distribute means to disseminate or
00:27:34 18 transfer possession to another person.

00:27:36 19 A "visual depiction" includes any
00:27:40 20 photograph, film, video or picture, including
00:27:43 21 undeveloped film and videotape, and data stored on
00:27:49 22 computer, disk, or by electronic means which is capable
00:27:52 23 of conversion into a visual image.

00:27:57 24 The government must prove that the defendant
00:28:00 25 received or distributed the depiction knowingly. An act

00:28:04 1 is done knowingly when it is done voluntarily and
00:28:07 2 intentionally and not because of accident, mistake, or
00:28:11 3 some other innocent reason.

00:28:12 4 The term "computer" means electronic,
00:28:18 5 magnetic, optical, electrochemical, or other high speed
00:28:23 6 data processing device performing logical, arithmetic,
00:28:29 7 or storage functions, and includes any data storage
00:28:34 8 facility or communications facility related to or
00:28:38 9 operating in conjunction with such device, but such term
00:28:42 10 does not include an automated typewriter or typesetter,
00:28:46 11 or portable handheld calculator or other similar device.

00:28:54 12 Minor and sexually explicit conduct defined.

00:28:59 13 The term "minor" means any person under the
00:29:02 14 age of 18 years.

00:29:04 15 "Sexually explicit conduct" means actual or
00:29:08 16 simulated.

00:29:10 17 Sexual intercourse, including
00:29:13 18 genital-to-genital, oral-genital, anal-genital, or
00:29:17 19 oral-anal, whether between persons of the same or
00:29:20 20 opposite sex.

00:29:21 21 bestiality;

00:29:24 22 masturbation;

00:29:25 23 sadistic or masochistic abuse; or

00:29:29 24 lascivious exhibition of the genitals or
00:29:33 25 public area of any person.

00:29:35 1 The government must prove that the
00:29:37 2 pornographic images in this case depicted real children
00:29:41 3 under the age of 18 years. You may rely on your
00:29:43 4 observations and judgments in evaluating the images to
00:29:47 5 determine whether they depict real children under the
00:29:51 6 age of 18 years.

00:29:52 7 The government need not present expert or
00:29:55 8 other testimony on whether the children are, in fact,
00:29:57 9 real children as opposed to, say, youthful adults or
00:30:01 10 computer-generated images of children.

00:30:03 11 The government also need not present expert
00:30:07 12 or other testimony on the ages of the children depicted.
00:30:11 13 Rather, the government may meet its burden of proving
00:30:17 14 the pornographic images depict real children under the
00:30:23 15 age of 18 years by presenting the images to you and
00:30:29 16 allowing you to evaluate the images for yourselves.

00:30:36 17 Lascivious exhibition - defined.

00:30:43 18 Not every exposure to the genitals or pubic
00:30:45 19 area constitutes lascivious exhibition. Whether a
00:30:49 20 picture or image of the genitals or pubic area
00:30:52 21 constitutes such lascivious exhibit requires
00:30:56 22 consideration of the overall content of the material.
00:31:00 23 It is for you to decide the weight or lack of weight to
00:31:04 24 be given to any of the following factors:

00:31:06 25 You may consider such factors as:

00:31:10 1 whether the focal point of the picture or
00:31:13 2 image is on the child's genitals or pubic area;
00:31:16 3 whether the setting of the picture or image
00:31:19 4 is sexually suggestive, that is, in a place or pose
00:31:22 5 generally associated with sexual activity;
00:31:24 6 whether the child is depicted in an
00:31:26 7 unnatural pose or inappropriate attire, considering the
00:31:29 8 age of the minor;
00:31:31 9 whether the child is fully or partially
00:31:33 10 clothed, or nude;
00:31:35 11 whether the picture or image suggests sexual
00:31:40 12 coyness or a willingness to engage in sexual activity;
00:31:43 13 and
00:31:44 14 whether the picture or image is intended or
00:31:47 15 designed to elicit a sexual response in the viewer.
00:31:51 16 Of course, a visual depiction or image need
00:31:55 17 not involve all of these factors to constitute a
00:31:59 18 lascivious exhibition of the genitals or pubic area.
00:32:08 19 Interstate commerce.
00:32:11 20 The term "interstate or foreign commerce"
00:32:15 21 means that the movement of property from one state to
00:32:18 22 another state, or from one state to another country, or
00:32:21 23 from another country to a state. The term "state"
00:32:25 24 includes a state of the United States, the district of
00:32:28 25 Columbia, and any commonwealth, territory, or possession

00:32:33 1 of the United States.

00:32:34 2 The phrase "transported in interstate or
00:32:37 3 foreign commerce" means that the visual depiction or
00:32:41 4 image, at any time, traveled or moved between one state
00:32:46 5 and another state, or between a foreign country and a
00:32:50 6 state. Evidence that an image was produced in a state
00:32:55 7 other than Ohio, or in a foreign country, is sufficient
00:32:59 8 to prove that the visual depiction or image has been
00:33:02 9 transported in interstate commerce or foreign commerce.

00:33:07 10 Evidence that a visual depiction or image
00:33:11 11 was transmitted or received electronically by a computer
00:33:15 12 connected to the internet is sufficient to establish
00:33:19 13 that the visual depiction or image was transported or
00:33:23 14 moved in interstate or foreign commerce. It is for you
00:33:27 15 to determine if the material containing the visual
00:33:30 16 depiction has been transmitted or received over the
00:33:34 17 internet or was produced using materials that had been
00:33:38 18 transmitted or received over the internet.

00:33:42 19 It is not necessary for the government to
00:33:44 20 prove that the defendant transported the material
00:33:47 21 containing the visual depiction in interstate or foreign
00:33:50 22 commerce. It is not necessary for the government to
00:33:53 23 prove that the defendant knew that the material
00:33:57 24 containing the visual depiction had moved in interstate
00:34:01 25 or foreign commerce. It is sufficient that the

00:34:05 1 government prove that at some point the material
00:34:09 2 containing the visual depiction traveled in interstate
00:34:14 3 or foreign commerce.

00:34:20 4 The essential element, Section 2252(a)(4)(B)
00:34:27 5 defined.

00:34:29 6 Charge. The defendant, Alex D. Cook, is
00:34:32 7 charged in Count 3 of the indictment with possession of
00:34:37 8 child pornography in violation of Title 18, United
00:34:39 9 States Code, Section 2252(a)(4)(B). In order for the
00:34:43 10 defendant to be found guilty of that charge, the
00:34:46 11 government must prove each of the following elements
00:34:48 12 beyond a reasonable doubt.

00:34:49 13 First, that the defendant knowingly
00:34:51 14 possessed photographs, computer files -- excuse me, that
00:34:58 15 the defendant knowingly possessed photographic computer
00:35:01 16 files which the defendant knew contained visual
00:35:04 17 depictions of real minors engaged in sexually explicit
00:35:08 18 conduct;

00:35:09 19 Second, the defendant knew the visual
00:35:14 20 depictions contained in the photographic computer image
00:35:17 21 files shows minors engaged in sexually explicit conduct;

00:35:22 22 Third, the defendant knew that production of
00:35:25 23 such visual depictions involved the use of a minor in
00:35:29 24 sexually explicit conduct; and

00:35:32 25 Fourth, that the visual depictions had been

00:35:36 1 either:

00:35:37 2 mailed, shipped or transported in interstate

00:35:39 3 or foreign commerce, or

00:35:41 4 produced using material that had been

00:35:45 5 mailed, shipped or transported in interstate or foreign

00:35:50 6 commerce by computer or other means.

00:35:54 7 I have already defined for you the terms

00:35:58 8 "visual depiction," "minor," "knowingly," and "sexually"

00:36:02 9 explicit conduct." During your deliberations you refer

00:36:05 10 to those instructions.

00:36:08 11 Producing means producing, direction,

00:36:11 12 manufacturing, issuing, publishing, or advertising.

00:36:17 13 Possession.

00:36:19 14 Next, I want to explain something about

00:36:22 15 possession. The government does not necessarily have to

00:36:26 16 prove that the defendant physically possessed the child

00:36:31 17 pornography for you to find him guilty of this crime.

00:36:34 18 The law recognizes two kinds of possession -- actual

00:36:39 19 possession and constructive possession. Either one of

00:36:42 20 these, if proved by the government, is enough for you to

00:36:46 21 convict.

00:36:48 22 To establish actual possession, the

00:36:51 23 government must prove that the defendant had direct

00:36:54 24 physical control over the child pornography, and knew

00:36:59 25 that he had control of it. In other words, I have

00:37:04 1 actual possession of my pen, even though I'm not
00:37:08 2 touching it. I have physical control of the pen, the
00:37:12 3 water pitcher, and so forth.

00:37:15 4 To establish constructive possession, the
00:37:18 5 government must prove that the defendant has the right
00:37:22 6 to exercise physical control over the child pornography
00:37:25 7 and knew that he had this right, and that he intended to
00:37:29 8 exercise physical control over the child pornography at
00:37:33 9 some time, either directly or through some other
00:37:37 10 persons.

00:37:39 11 For example, if you left something with a
00:37:41 12 friend intending to come back later and pick it up, or
00:37:45 13 intending to send someone else to pick it up for you,
00:37:47 14 you would have constructive possession of it while it
00:37:51 15 was in the actual possession of your friend.

00:37:56 16 Another example, presently I have
00:37:58 17 constructive possession of everything in my office,
00:38:01 18 everything at home. My automobile, whatever is in it.
00:38:06 19 I am not physically with it, but I have constructive
00:38:09 20 possession. I can exercise control over it.

00:38:14 21 But understand just being present where
00:38:19 22 something is located does not equal possession. The
00:38:22 23 government must prove that the defendant had actual or
00:38:25 24 constructive possession of the child pornography, and
00:38:29 25 knew that he did, for you to find him guilty of this

00:38:33 1 crime. That is, of course, for you to decide.

00:38:41 2 The final instruction I will read you this

00:38:43 3 afternoon, the First Amendment does not protect child

00:38:46 4 pornography. You are instructed that the First

00:38:48 5 Amendment of the United States Constitution does not

00:38:51 6 protect visual depictions of a minor engaged in sexually

00:38:55 7 explicit conduct as charged in the indictment.

00:38:58 8 That will end the reading of the initial

00:39:00 9 instructions.

00:39:01 10 Amy, if you'll pick up the -- any changes or

00:39:07 11 corrections, Mr. Secor?

00:39:09 12 MR. SECOR: No, Your Honor.

00:39:10 13 MS. KELLEY: None, Your Honor.

00:39:51 14 Ladies and gentlemen, we will now begin the

00:39:54 15 presentation of the case. And that involves separate

00:40:06 16 events. We start first with the opening statements of

00:40:11 17 counsel. And we will have the actual presentation of

00:40:17 18 testimony. Then I will once again charge you with my

00:40:19 19 final instructions. Then we will have the closing

00:40:23 20 arguments of counsel, and the case will be in your hands

00:40:27 21 for deliberation.

00:40:29 22 I believe I mentioned, if I forgot to do so,

00:40:33 23 I will do so now, two of you will wind up being removed

00:40:39 24 from the jury at that time, assuming there are still 14

00:40:43 25 of you left. And that designation will occur at the end

00:40:48 1 of the trial. So all of you should listen very
00:40:50 2 carefully during the course of the trial to everything
00:40:54 3 that occurs.

00:40:57 4 A couple of other matters that I want to
00:41:00 5 mention to you. You've been given notebooks. You can
00:41:03 6 use those notebooks, whatever use and purpose you want
00:41:06 7 to put them to. I will be up here taking notes on my
00:41:09 8 computer. That's how I am able to follow along and best
00:41:15 9 recall what I heard and saw. And you can do likewise in
00:41:20 10 your notebooks or, if it's easier and more effective for
00:41:24 11 you simply to listen without taking notes individually,
00:41:28 12 that's entirely up to you.

00:41:30 13 You will have your notebooks with you back
00:41:33 14 in the jury room. And you can consult them and use them
00:41:37 15 for any use and purpose you want to help recall the
00:41:41 16 evidence and the testimony.

00:41:43 17 A couple of things about notes, though.
00:41:45 18 First of all, you should not rely upon the one or two of
00:41:53 19 you who seem to have taken the best or most
00:41:56 20 comprehensive or comprehensible set of notes. It's up
00:42:00 21 to you each individually to listen carefully and to then
00:42:04 22 recall the testimony and evidence as you understood it
00:42:07 23 as it came in. As I say, I already indicated that
00:42:12 24 reading back the testimony is a very unusual occurrence.
00:42:17 25 Sometimes in great big long multi-week, multi-month

00:42:21 1 trials, a judge may permit that to happen. That's why
00:42:26 2 we have notebooks. You have to take notes as we go
00:42:30 3 along. Why do I generally not permit the reading back
00:42:32 4 of testimony even when asked to do so? That is because
00:42:36 5 the risk would be very great that you would emphasize
00:42:39 6 that particular testimony, having heard it more than
00:42:43 7 once. It's very important that you listen carefully all
00:42:47 8 along the way and not simply assume that you don't have
00:42:51 9 to pay too much attention now because when the time
00:42:54 10 comes for deliberations, we can have you back out here
00:42:58 11 rereading big or small chunks of testimony. It's your
00:43:05 12 duty to pay close and careful attention.

00:43:07 13 I mentioned earlier if you get sleepy or you
00:43:10 14 find your mind wandering, say, Judge, can we take a
00:43:15 15 short break? As I say to people, the hardest part of my
00:43:20 16 job is 2:00, 2:15, after lunch. I sometimes get sleepy.
00:43:24 17 So may you. If you find yourself with your mind
00:43:27 18 wondering, interrupt. Take a quick break. No problem
00:43:30 19 with that at all. It's very important that you hear and
00:43:32 20 attend to all the testimony and evidence as it comes
00:43:35 21 before you in the courtroom.

00:43:41 22 Many of you indicated you're on Facebook or
00:43:44 23 on Twitter or other kind of social media. You cannot
00:43:47 24 consult anything outside the courtroom. You cannot go
00:43:53 25 to a dictionary or encyclopedia. You cannot go online

00:44:00 1 to look up anything that would have anything to do with
00:44:03 2 the trial. Once in a while there are instances where
00:44:07 3 jurors have been found texting or Twittering or whatever
00:44:11 4 even in the courtroom. You cannot do that. Any kind of
00:44:14 5 communication -- it may seem like idle gossip; I'm in
00:44:21 6 federal court; it's a pretty room; the lawyers are nice,
00:44:25 7 see you later. Not even that. It's prohibited. When
00:44:31 8 you leave in the afternoon to go home, don't talk about
00:44:34 9 the case at home. When you go home tonight, some of you
00:44:37 10 have family here, so they understand, but when you go
00:44:40 11 home tonight, unquestionably whoever is there is going
00:44:45 12 to say, Well, what's it like? I think only one of you
00:44:50 13 was on a jury before. Maybe none of you. So the
00:44:53 14 temptation, the impulse to talk about this new
00:44:56 15 experience, this case that's going to be in your hands
00:44:59 16 for decision is going to be very great. Understandably
00:45:03 17 great. My wife is always asking me what I did in court.
00:45:07 18 And you simply have to say -- you absolutely have to
00:45:10 19 say, I cannot talk about the case. And those of you who
00:45:14 20 will be riding home together, understand, don't ask
00:45:17 21 about the case; don't talk about the case. When you
00:45:21 22 gather together in the jury room, either awaiting the
00:45:24 23 beginning of trial, during a break, or at lunchtime, or
00:45:28 24 whatever, don't talk about the case. It would really --
00:45:31 25 you would but letting your fellow jurors down. You

00:45:34 1 would be letting the lawyers and their clients down.
00:45:38 2 You'd be letting each other down. Because as I say,
00:45:44 3 you're going to start making your mind up if you start
00:45:47 4 talking about the case. And you can't do that. You
00:45:49 5 have to keep an open mind. I know that's unnatural. It
00:45:53 6 seems odd and counterintuitive.

00:46:02 7 It's assuring each of these parties to
00:46:06 8 what's so important; they receive a fair trial and
00:46:10 9 consideration to which they're entitled and to which
00:46:13 10 every citizen is entitled whenever someone stands
00:46:16 11 charged with a crime. You would want no more if you
00:46:22 12 were sitting at one of these tables. And I expect that
00:46:25 13 you will do exactly that as I've indicated.

00:46:30 14 In a moment Mr. Secor or Mr. Crawford -- who
00:46:32 15 will be presenting opening statement?

00:46:34 16 MR. SECOR: Mr. Crawford.

00:46:35 17 THE COURT: In a moment Mr. Crawford will
00:46:36 18 present the government's opening statement. The opening
00:46:39 19 statement is simply the introduction to you of what the
00:46:43 20 government believes its evidence will be and what it may
00:46:47 21 show. It's not a closing argument. It's not intended
00:46:50 22 to persuade you. It's simply to lay out for you the --
00:46:55 23 where the government's going to be headed and to
00:46:57 24 introduce you to some of the government's witnesses and
00:46:59 25 some of the testimony and exhibits that you're likely to

00:47:03 1 receive. You can make notes or whatever during this or
00:47:07 2 anytime during the trial. But it's to acquaint you with
00:47:10 3 what the government expects the evidence will be.

00:47:13 4 Sometimes witnesses don't appear for
00:47:15 5 whatever reason. They may not be called for whatever
00:47:18 6 reason. And, in fact, sometimes evidence that's
00:47:20 7 mentioned in opening statement, in fact, isn't produced.
00:47:24 8 In which case, nothing that you hear in opening
00:47:28 9 statement is evidence, whether the evidence/witnesses
00:47:36 10 come before you or not. The opening statement is not
00:47:38 11 evidence. It's a discussion of what the government
00:47:41 12 thinks the evidence will be. The evidence is what you
00:47:43 13 hear from the witnesses who testify here in front of
00:47:46 14 you, the exhibits that you see, and other matters that
00:47:50 15 are permitted to come to your attention during the
00:47:52 16 course of the trial. The opening statements are not
00:47:54 17 evidence.

00:47:56 18 Likewise, Ms. Kelley will give her opening
00:47:58 19 statement of the defendant. It too is not evidence. It
00:48:02 20 is simply her expectation of what the evidence will be,
00:48:08 21 who the witnesses may be and what the testimony will be.
00:48:11 22 If it turns out to be otherwise than either the
00:48:15 23 government or Ms. Kelley present, don't hold that
00:48:18 24 against them. Sometimes things happen. Don't
00:48:21 25 speculate, well, gee, I thought we were going to hear

00:48:24 1 from Mr. Tom Smith. We didn't. You didn't; therefore,
00:48:31 2 you can't consider anything about what Mr. Smith or what
00:48:33 3 his evidence might have been, even though you might have
00:48:36 4 been told about it in opening statement. You can't
00:48:39 5 consider it if Mr. Smith doesn't appear here in court
00:48:41 6 and doesn't give testimony. Only that is evidence.

00:48:47 7 Mr. Crawford, you may begin.

00:48:50 8 MR. SECOR: Your Honor, may I make a motion
00:48:52 9 for separation of witnesses?

00:48:54 10 THE COURT: Sure.

00:48:56 11 MR. SECOR: Request my special agent be
00:48:59 12 allowed in the room.

00:49:00 13 THE COURT: No problem. I'll leave it up to
00:49:03 14 each of you to police that. That means anybody being
00:49:09 15 called as a witness has to wait outside until they
00:49:13 16 testify. That's to make sure each witness presents
00:49:17 17 their testimony unaffected by the evidence that may have
00:49:19 18 appeared during the trial. The government is entitled
00:49:21 19 to have a special agent with it as the government's
00:49:25 20 representative, just as, of course, Mr. Cook has the
00:49:28 21 absolute right to attend all phases of the trial.

00:49:31 22 Thank you, Mr. Secor.

00:49:32 23 Now, Mr. Crawford.

00:49:39 24 MR. CRAWFORD: Ladies and gentlemen, this is
00:49:40 25 a case about Mr. Cook, the defendant, and his use of his

00:49:45 1 personal computer and the internet to receive,
00:49:48 2 distribute, and possess child pornography. As the Court
00:49:51 3 indicated to you, child pornography is that pornography
00:49:58 4 which is made and depicts children in sexually explicit
00:50:02 5 activity.

00:50:03 6 In the next days you will hear all of the
00:50:06 7 evidence substantiating those charges the Court
00:50:08 8 mentioned to you. Investigating this case is the FBI.
00:50:11 9 You'll hear testimony from the FBI agent in Oklahoma who
00:50:15 10 will tell you how the FBI located Mr. Cook. This agent
00:50:21 11 engaged in something called an undercover session, which
00:50:24 12 he'll explain to you, in which he uses a computer to
00:50:27 13 search the internet for those who possess child
00:50:31 14 pornography and are willing to share with others.

00:50:33 15 In this particular case the FBI used a
00:50:35 16 program called LimeWire. It's publicly available.
00:50:39 17 People can download it, use it for free. And it's
00:50:42 18 called a file sharing program. And what it allows the
00:50:45 19 user to do is to see what all the other LimeWire users
00:50:49 20 on the network have in their computers, what sorts of
00:50:54 21 files they want to share. It's often used for sharing
00:50:57 22 music, concert videos, pictures, adult pornography,
00:51:05 23 child pornography. This FBI agent used LimeWire to
00:51:09 24 search for child pornography, and he found something.
00:51:12 25 When he found that child pornography, he was able to

00:51:15 1 determine it was coming from a certain IP address. An
00:51:18 2 IP address is called an internet protocol address, like
00:51:22 3 a street address for the internet. After a little more
00:51:25 4 investigation he determined that the person using that
00:51:29 5 IP address and sharing that pornography, he determined
00:51:33 6 that was linked to a Time Warner internet user account
00:51:37 7 linked with Mr. Cook.

00:51:40 8 That Oklahoma FBI agent sent it to the FBI
00:51:44 9 agents in Lima. Those agents did their investigation,
00:51:47 10 located Mr. Cook, learned a little about him. Learned
00:51:50 11 that he was a student at the University of Northwest
00:51:52 12 Ohio, he lived at 1216 Knollwood in Lima. Served a
00:51:58 13 search warrant. Sure enough, Mr. Cook had a computer.

00:52:03 14 Mr. Cook accompanied the agents down to the
00:52:06 15 Lima FBI office. There he gave statement. In that
00:52:08 16 statement he admitted to downloading child pornography
00:52:11 17 from the internet along with a number of other
00:52:14 18 incriminating evidence.

00:52:15 19 You'll hear the FBI agent that took those
00:52:17 20 statements from Mr. Cook. And he will describe the two.
00:52:21 21 As I mentioned, the FBI agents also seized Mr. Cook's
00:52:24 22 computer from his apartment and they turned that
00:52:26 23 computer over to Toledo Police detectives in the
00:52:31 24 computer crime section. And those Toledo detectives
00:52:34 25 engaged in a very careful process called computer

00:52:37 1 forensic analysis where they looked at Mr. Cook's
00:52:41 2 computer, determined what was on it. Sure enough,
00:52:43 3 there's child pornography on that computer. And the
00:52:46 4 detective will come in; he will explain that process to
00:52:48 5 you.

00:52:52 6 Beyond that, ladies and gentlemen, I want to
00:52:53 7 say something to you briefly about the concept of
00:52:56 8 knowledge. The Judge instructed you on the elements of
00:52:58 9 the crime, and what Mr. Cook knew or maybe didn't know
00:53:04 10 during the time that all this was happening may play a
00:53:08 11 role in your deliberations. It's important for you to
00:53:10 12 understand -- well, for example, elements of the crime,
00:53:14 13 whether or not Mr. Cook knew that he was receiving or
00:53:17 14 distributing child pornography, whether he knew he
00:53:20 15 possessed it, whether he knew that pornography actually
00:53:24 16 depicted children in sexually explicit conduct.

00:53:28 17 Well, as the Judge explained to you, there's
00:53:30 18 not going to be any direct evidence of knowledge because
00:53:33 19 no one can sit on the stand and say, I've looked in Mr.
00:53:37 20 Cook's head, and tell you what he knew. That doesn't
00:53:39 21 mean you can't make judgments and decisions about what
00:53:42 22 other people knew. As the Judge explained, once you
00:53:44 23 listen carefully to the evidence, it can suggest what
00:53:47 24 Mr. Cook knew. What did he say? What did he say to
00:53:49 25 the FBI agent at the FBI Lima office? What about his

00:53:53 1 computer would suggest what he knew or didn't know at
00:53:57 2 the time these actions are taking place?

00:54:03 3 And, ladies and gentlemen, I believe at the
00:54:04 4 end of this process we'll come back for closing
00:54:08 5 arguments, and we'll have heard all of the evidence. We
00:54:10 6 will ask you to return a verdict that we believe is
00:54:13 7 appropriate, and that is a verdict of guilt. Thank you.

00:54:16 8 THE COURT: Ms. Kelley.

00:54:17 9 MS. KELLEY: Good afternoon. If you had
00:54:25 10 listened to Mr. Crawford's opening statement, you might
00:54:28 11 wonder, well, why on earth are we here? After all,
00:54:34 12 Alex's computer was found to have these materials on it,
00:54:38 13 and we're told he made a confession.

00:54:44 14 Well, ladies and gentlemen, during the
00:54:46 15 course of this trial the evidence and the testimony will
00:54:51 16 show that Alex did not knowingly put those items on his
00:54:57 17 computer. And just as importantly, the testimony and
00:55:01 18 the evidence will show that he in no way, shape, or form
00:55:07 19 confessed to a crime that he did not, did not commit.

00:55:14 20 Now, before I say one more word, I want to
00:55:18 21 caution you that I am not condoning child pornography,
00:55:24 22 and Alex and his family are certainly not condoning
00:55:28 23 child pornography. I think we can all agree that it's
00:55:31 24 perverted and it's disgusting and it has no place in a
00:55:36 25 civilized society. But that's not why we're here.

00:55:41 1 That's not the reason why you're here. Your sole role
00:55:46 2 is to determine whether it was Alex who put those items
00:55:50 3 on his computer, whether it was Alex who knowingly put
00:55:56 4 those items on his computer beyond a reasonable doubt.

00:56:03 5 For indeed, this case is all about Alex.
00:56:07 6 During this trial you will learn who he is, the values
00:56:13 7 that he possesses, the way he was raised, the person he
00:56:19 8 is, and the person he hopes to become. The evidence
00:56:22 9 will show that he was raised by a good God-fearing
00:56:27 10 family. The evidence will show that he was an Eagle
00:56:31 11 Scout. The evidence will show that he always struggled
00:56:34 12 in school, not because he's dumb or unmotivated, but
00:56:39 13 ever since first grade he's been diagnosed with a
00:56:42 14 reading disability, and he's always been forced to have
00:56:47 15 special accommodations just so he could get through
00:56:51 16 school. The evidence will show that during the time in
00:56:55 17 question he was working at a job and that he was going
00:57:00 18 to school.

00:57:03 19 Now, by this time you must be thinking,
00:57:06 20 well, I want to hear about that confession. What's all
00:57:09 21 this about a confession? And then she says he confessed
00:57:13 22 to something he did not commit. Well, ladies and
00:57:16 23 gentlemen, we are not contending that law enforcement
00:57:21 24 beat a confession out of him. We're not contending that
00:57:25 25 law enforcement locked him into some little room and

00:57:30 1 extracted this story from him. Far from it. Rather, we
00:57:36 2 are contending that Alex did not understand what he was
00:57:41 3 reading, and the evidence will show that he was not
00:57:45 4 given the proper circumstances and accommodations to
00:57:50 5 understand this supposed confession.

00:57:57 6 These charges are heinous, absolutely
00:57:59 7 heinous. But that being the case, that is why Alex is
00:58:07 8 going to have the courage to take the stand in his own
00:58:11 9 defense, to look each one of you in the eye and to swear
00:58:18 10 under oath that he did not put these disturbing images
00:58:23 11 on his computer, and that he did not confess to a crime
00:58:28 12 he did not commit.

00:58:33 13 And just as important, the evidence and the
00:58:36 14 testimony is going to show that there was someone else
00:58:41 15 in Alex's apartment who had possession of that computer.
00:58:47 16 There was someone else in that apartment who had access
00:58:52 17 to it. The evidence will show that, no, the IP address
00:59:01 18 was not to this individual, but the evidence will show
00:59:05 19 that the time of these images, the time that they
00:59:09 20 supposedly appeared on Alex's computer directly
00:59:14 21 coincided with the time that person lived with Alex in
00:59:20 22 that apartment. Strangely enough, the evidence will
00:59:24 23 show that that person denied all of this, that that
00:59:31 24 person disappeared after these charges were made, and
00:59:35 25 that person has not been seen or heard of since. Or

00:59:42 1 maybe he has.

00:59:46 2 This trial is about three very important
00:59:50 3 points: Number one, was it Alex who put those objects
00:59:57 4 on the computer? Number two, did he confess to a crime
01:00:05 5 he did not commit? And does the government have the
01:00:10 6 right person?

01:00:12 7 Thank you.

01:00:14 8 THE COURT: Okay. Mr. Secor or Mr.
01:00:16 9 Crawford, you may call your first witness.

01:00:19 10 MR. CRAWFORD: Your Honor, the government
01:00:20 11 would call Special Agent Whisman.

01:01:28 12 THE COURT: Will you spell the agent's name
01:01:30 13 and tell the ladies and gentlemen in a couple sentences
01:01:33 14 what you expect the agent testify to.

01:01:35 15 MR. CRAWFORD: His last name is
01:01:38 16 W-h-i-s-m-a-n. Agent Whisman is the agent who conducted
01:01:42 17 an undercover session in which he took on the persona of
01:01:47 18 the LimeWire user and downloaded child pornography.

01:02:03 19 THE COURT: His first name?

01:02:04 20 MR. CRAWFORD: Richard.

01:02:04 21 (Whereupon the witness was sworn by the
01:02:52 22 clerk.)

01:02:52 23 THE COURT: Agent, slide about this distance
01:02:56 24 from the microphone, please.

01:02:58 25 Ladies and gentlemen, if at any time you

01:03:00 1 can't hear somebody, please speak up, okay? Just raise
01:03:03 2 a hand and say, Judge, I can't hear. It's very
01:03:07 3 important that you hear everything. So if you can't,
01:03:11 4 ask him to speak up.

01:03:12 5 And will you tell the ladies and gentlemen
01:03:14 6 your name, please.

01:03:15 7 THE WITNESS: Richard Whisman,
01:03:16 8 W-h-i-s-m-a-n.

01:03:19 9 THE COURT: What is your occupation or
01:03:20 10 position?

01:03:21 11 THE JUROR: I am a special agent with the
01:03:23 12 FBI.

01:03:24 13 THE COURT: And where are you presently
01:03:26 14 assigned?

01:03:27 15 THE JUROR: Tulsa, Oklahoma.

01:03:30 16 THE COURT: And during the events giving
01:03:31 17 rise to this case, where were you assigned?

01:03:35 18 THE WITNESS: Tulsa, Oklahoma.

01:03:37 19 THE COURT: What at that time were your
01:03:38 20 duties, at least with reference to this particular case?

01:03:42 21 THE WITNESS: I'm assigned to work
01:03:43 22 computer-related crimes which involves work on the FBI's
01:03:46 23 undercover program called innocent images, which is the
01:03:50 24 investigation of the online sexual exploitation of
01:03:54 25 children.

01:03:54 1 THE COURT: And how long have you been an
01:03:56 2 agent?
01:03:57 3 THE WITNESS: About nine years.
01:03:58 4 THE COURT: And before that did you have any
01:04:00 5 law enforcement experience?
01:04:01 6 THE WITNESS: I was a police officers in the
01:04:03 7 city of West Chicago, Illinois for about seven years.
01:04:06 8 THE COURT: And before that what sort of
01:04:08 9 education or training did you have?
01:04:10 10 THE WITNESS: I have a bachelor's degree.
01:04:14 11 THE COURT: Any military service at all?
01:04:17 12 THE WITNESS: No.
01:04:20 13 THE COURT: I think that's it for initial
01:04:22 14 questions.
01:04:26 15 - - -
01:04:26 16 RICHARD WHISMAN, DIRECT EXAMINATION
01:04:26 17 BY MR. CRAWFORD:
01:04:26 18 Q. Agent Whisman, do you have any experience related
01:04:32 19 to child pornography investigations?
01:04:33 20 A. I've been working them about seven and a half
01:04:36 21 years.
01:04:36 22 Q. Can you generally describe what your duties and
01:04:38 23 activities with respect to those investigations are?
01:04:41 24 A. Starting probably early 2004, I became part of
01:04:45 25 the innocent images program through the FBI where we go

01:04:50 1 online undercover in several different aspects, one of
01:04:55 2 which is looking for distributors of child pornography.

01:04:57 3 Q. Do you frequently engage in something called an
01:05:00 4 undercover session?

01:05:01 5 A. Yes.

01:05:02 6 Q. What is an undercover session?

01:05:04 7 A. The session is where we go online on the internet
01:05:08 8 conducting investigations such as looking for
01:05:13 9 distributors of child pornography.

01:05:15 10 Q. And how do you conduct it?

01:05:17 11 A. One way we do it is through a program called
01:05:22 12 LimeWire, which is a peer-to-peer file sharing program.
01:05:26 13 It's a free program. There's also a paid version of it.
01:05:32 14 It's also a free download; anybody can go out and
01:05:36 15 download it. With this program people install it on
01:05:39 16 their computer and they can go out and search for
01:05:42 17 different types of files, pictures, videos, music files,
01:05:45 18 documents, even program files. Once you have it
01:05:49 19 installed on your computer, you can download files from
01:05:52 20 others by conducting key word searches, for example.
01:05:57 21 Then once you do that, you're also able to share those
01:06:02 22 files with other people who have the same program.

01:06:04 23 Q. And what sort of files can you share using
01:06:06 24 LimeWire?

01:06:07 25 A. It could be any file; it could be an image file,

01:06:11 1 a video file, a program file, document. The way that
01:06:20 2 LimeWire works -- our version we use is enhanced; it's a
01:06:25 3 little bit different than what the average person uses.
01:06:27 4 For example, the way LimeWire works, to make it a faster
01:06:31 5 program to download files, say I selected a file to
01:06:34 6 download from someone. If other people also have that
01:06:38 7 file offered for downloading, it will download that file
01:06:41 8 from more than one location and put it back together as
01:06:44 9 one file on my computer to make it fast. For our
01:06:47 10 purposes that wouldn't work, so our LimeWire program
01:06:50 11 will only download from one person at a time so we can
01:06:54 12 definitively say where that file came from.

01:06:57 13 Q. So when you download a file from LimeWire, where
01:07:02 14 exactly does the file come from?

01:07:03 15 A. Another user. There is no central server on
01:07:07 16 LimeWire. When I'm downloading a file from someone, it
01:07:10 17 goes directly from that person's computer to my
01:07:12 18 computer.

01:07:13 19 Q. And that person could be anyone using LimeWire?

01:07:15 20 A. Yes.

01:07:18 21 Q. Now, you mentioned searches. Could you just
01:07:20 22 again described how the key word searching process works
01:07:24 23 in LimeWire?

01:07:24 24 A. You can search specifically for just, like,
01:07:27 25 images, or videos, or music, or you can search for all

01:07:31 1 types of files by entering key words. For our cases
01:07:37 2 just through experience there's several terms that we
01:07:40 3 know have been associated with child pornography files;
01:07:43 4 a lot of them have, like, a number, like nine, ten, and
01:07:47 5 a Y after it for nine-year-old or ten-year-old. Some of
01:07:52 6 them I put in preteen; PTHC, which stands for preteen
01:08:03 7 hardcore; LSM, which stands for Lolita series magazine.
01:08:10 8 Just several terms like that.

01:08:12 9 Q. Once you enter these search terms, what does
01:08:15 10 LimeWire then do?

01:08:16 11 A. It displayed a list of files that people are
01:08:22 12 offering that file for download. Then you go and you
01:08:26 13 can simply click on that file to download it. Or it
01:08:29 14 also has a feature where you can browse a host. And
01:08:33 15 what that will do, you highlight the file you want and
01:08:36 16 hit "browse host," and then it will bring up all the
01:08:39 17 files that that particular user is sharing.

01:08:42 18 Q. When you say click on it and download it, what do
01:08:46 19 you mean?

01:08:46 20 A. Clicking on it with your mouse on the screen.
01:08:50 21 And when you download a file, it's essentially copying
01:08:54 22 it, copying it from one person's computer and sending it
01:08:57 23 to mine.

01:09:04 24 Q. When you make a copy and you download it, where
01:09:09 25 does it store this copy?

01:09:11 1 A. On my computer.

01:09:12 2 Q. And how do you know you've got the entire file

01:09:14 3 that you wanted to copy?

01:09:17 4 A. With our program it's got a built-in login

01:09:22 5 feature where it logs basically all the traffic from my

01:09:25 6 computer and any computer I'm downloading from. From

01:09:28 7 those logs it gives me a summary of what IP address,

01:09:32 8 basically the location where the file came from, and I

01:09:35 9 end up with a completed download file.

01:09:37 10 Q. And what is an IP address?

01:09:39 11 A. IP address stands for internet protocol address.

01:09:44 12 It's a series of four numbers separated by decimals. It

01:09:48 13 essentially identifies a particular internet account.

01:09:54 14 Q. Does it tell you specifically what computer or

01:09:57 15 what human being was using that IP address at the time?

01:10:00 16 A. No, it would just tell you the internet account.

01:10:03 17 Q. And what can you do with that IP address to learn

01:10:06 18 more about where these images might be coming from?

01:10:09 19 A. All the IP addresses are assigned to various

01:10:12 20 internet service providers, and we send a subpoena to

01:10:15 21 the internet service provider asking who they assigned

01:10:20 22 that particular IP address to at that particular date

01:10:23 23 and time.

01:10:25 24 Q. More specifically were you conducting undercover

01:10:27 25 sessions in LimeWire in the summer of 2010?

01:10:31 1 A. Yes, I was.

01:10:31 2 Q. And were you involved in one that resulted in an
01:10:35 3 IP address pointing to Lima, Ohio?

01:10:39 4 A. Yes.

01:10:39 5 Q. Could you just describe that undercover session,
01:10:41 6 please.

01:10:42 7 A. That was on June 22. I began the session around
01:10:48 8 4:20 in the afternoon and started conducting the search
01:10:51 9 terms or putting in the search terms looking for child
01:10:55 10 pornography files. One of the terms I put in was 9YO
01:10:59 11 for nine-year-old. It brought up a list of people that
01:11:05 12 had that term offered for download. In this particular
01:11:08 13 case there were several files offered from a user in
01:11:11 14 Lima, Ohio. Our version of LimeWire also gives you
01:11:14 15 approximate geographic location of the person sharing
01:11:17 16 that file. That's how I know it was Lima.

01:11:20 17 I highlighted one of the files and clicked
01:11:23 18 "browse host," which then brought up a list of all the
01:11:26 19 files that particular user was sharing. In this case it
01:11:30 20 was just over 800 files. About 71 of them were video
01:11:36 21 files, and 97 were image files. The majority of the
01:11:41 22 image and video files had terms consistent with child
01:11:44 23 pornography in the file names.

01:11:46 24 Q. You mentioned using search terms to search on
01:11:50 25 LimeWire. What does LimeWire do with those search

01:11:53 1 terms? Where does it use those terms to search to find
01:11:56 2 results?

01:11:57 3 A. LimeWire does not have a central server because
01:12:00 4 it's a peer-to-peer operation, one computer to another.
01:12:03 5 What LimeWire does is some LimeWire users are dedicated
01:12:07 6 as what they call ultra peers; their computer
01:12:10 7 essentially will store, like, a database of file names
01:12:13 8 that other users are sharing. And when I sent out a
01:12:17 9 search term, it will ask those data bases for who's
01:12:20 10 sharing a file with the search term. Then it will point
01:12:23 11 me in the right direction of where to go to get that
01:12:27 12 file.

01:12:27 13 Q. What do you mean by who's sharing a file with
01:12:29 14 this search term?

01:12:30 15 A. If I have shared files with my shared directory
01:12:34 16 using LimeWire, it's put out to the network that I have
01:12:37 17 these files for download. Then other people are able to
01:12:40 18 see those files and download them.

01:12:42 19 Q. But it is the file name or some other aspect of
01:12:46 20 this file that LimeWire is looking for to match up with
01:12:49 21 the search terms?

01:12:52 22 A. I'm sorry? One more time.

01:12:54 23 Q. Is LimeWire using your search terms to look at
01:12:58 24 file names or some other aspect of these files to
01:13:00 25 determine whether or not --

01:13:02 1 A. It's looking at the file names.

01:13:05 2 Q. You mentioned an undercover session in the summer

01:13:08 3 of 2010. And you were able to download a number of

01:13:14 4 images containing child pornography?

01:13:16 5 A. Yes.

01:13:17 6 Q. Were you able to determine the source?

01:13:18 7 A. Yes, I was.

01:13:19 8 Q. And describe that source, please.

01:13:21 9 A. It was an IP address by the internet service

01:13:27 10 provider Roadrunner, which is associated with Time

01:13:30 11 Warner Cable. They are located in Lima, Ohio.

01:13:39 12 Q. Approximately how many images did you download?

01:13:44 13 A. Thirty.

01:13:44 14 Q. What did you do with the downloaded images once

01:13:47 15 you completed your session?

01:13:48 16 A. I saved them to a CD and submitted them to

01:13:51 17 evidence.

01:14:17 18 Q. Special Agent Whisman, this is government's

01:14:21 19 Exhibit 1. Do you know what that is?

01:14:24 20 A. That is a copy of the CD that I made to send to

01:14:27 21 their office in Lima, Ohio to further this

01:14:30 22 investigation.

01:14:31 23 Q. How do you recognize it?

01:14:32 24 A. It's got my writing on it.

01:14:35 25 Q. And generally can you describe what information

01:14:38 1 is contained on that disk?

01:14:39 2 A. The program that I use, our enhanced version of
01:14:45 3 LimeWire, for each file I download, it creates a
01:14:48 4 separate folder. And within that folder it stores all
01:14:51 5 the supporting log files to show where the file came
01:14:53 6 from along with the file I downloaded.

01:14:55 7 Q. And are the images that you downloaded during
01:14:58 8 that session on that disk?

01:14:59 9 A. Yes, it is.

01:15:01 10 MR. CRAWFORD: Your Honor, at this time we're
01:15:03 11 going to load the disk in the computer so he can explain
01:15:06 12 it more to the jury.

01:15:07 13 THE COURT: Okay.

01:15:55 14 (Image displayed in open court.)

01:15:59 15 BY MR. CRAWFORD:

01:15:59 16 Q. Do you recognize this screen, Special Agent
01:16:01 17 Whisman?

01:16:02 18 A. Those are the beginning of that file on that
01:16:04 19 disk.

01:16:04 20 Q. What does 11905 mean?

01:16:08 21 A. That is the number assigned to this undercover
01:16:10 22 session. Every time we do a session, it's given a
01:16:12 23 number to keep track of them.

01:16:17 24 Q. And what's this folder?

01:16:19 25 A. That is the IP address where the files were

01:16:22 1 downloaded from.

01:16:27 2 Q. And here we have a longer list of file folders.

01:16:30 3 What are these file folders?

01:16:32 4 A. Those are -- there's one folder for each file

01:16:35 5 that I downloaded. And within those folders are the

01:16:38 6 file I downloaded along with the supporting

01:16:40 7 documentation.

01:16:46 8 Q. Do you see the one I've highlighted there?

01:16:48 9 A. Yes.

01:16:49 10 Q. I'm opening that one. You have some additional

01:16:52 11 information in that folder. Could you briefly describe

01:16:54 12 what that information is?

01:16:55 13 A. Those contain the supporting log files.

01:16:59 14 THE COURT: I'm sorry, containing? I'm

01:17:02 15 sorry; I didn't get the complete thing you said.

01:17:05 16 Contains what files?

01:17:06 17 THE WITNESS: The log files, supporting

01:17:08 18 files, to show where the file came from, my downloaded

01:17:12 19 file, along with the screen capture that was taken of my

01:17:17 20 downloading it. It takes a picture of my screen, then

01:17:21 21 the file that I downloaded.

01:17:24 22 BY MR. CRAWFORD:

01:17:24 23 Q. I've highlighted one file that's called a PNG

01:17:28 24 image. What's a PNG image?

01:17:31 25 A. It's an image file.

01:17:41 1 Q. Could you generally describe what this screen is,
01:17:43 2 this image is?

01:17:44 3 A. That is a picture that was taken of my screen
01:17:47 4 after the file downloaded. That is a picture of our
01:17:49 5 LimeWire that I was using.

01:17:51 6 Q. And it looks like in the top half of the screen
01:17:54 7 there are a number of lines there. What's going on on
01:17:56 8 the top half of the screen?

01:17:58 9 A. On the top left, that column are a list of file
01:18:02 10 names that were being shared by that IP address.

01:18:10 11 Q. Are you referring to these files that I've
01:18:12 12 enlarged there?

01:18:13 13 A. Yes.

01:18:17 14 Q. Are those search results?

01:18:19 15 A. Those are all the files being shared by that IP
01:18:22 16 address listed there, the 98.31.57.201.

01:18:29 17 Q. Where I have the mouse, is that the number you're
01:18:33 18 referring to?

01:18:34 19 A. Yes, it is.

01:18:34 20 Q. I've got my curser next to one image. Was this
01:18:46 21 one of the search results you received?

01:18:48 22 A. Yes.

01:18:48 23 Q. Does it contain words consistent with child
01:18:53 24 pornography?

01:18:53 25 A. Yes, it does.

01:18:54 1 Q. Would you describe some of those words, please?

01:18:56 2 A. 9YO.

01:18:59 3 Q. What does that stand for?

01:19:00 4 A. Nine year old.

01:19:01 5 Underage Lolita, which is associated with child

01:19:07 6 pornography. PTHC; PTSC, which stands for preteen soft

01:19:13 7 core; PEDO, child having sex, underage, pussy fan, and

01:19:21 8 kiddie.

01:19:29 9 Q. And moving along there on that file name, there's

01:19:35 10 information on the right-hand columns there. Can you

01:19:37 11 describe what that information is?

01:19:39 12 A. The first column is the size of the file; then

01:19:43 13 the IP address of where it's coming from; the internet

01:19:46 14 service provider, which is Roadrunner; it's in the

01:19:50 15 approximate location of Lima, Ohio, United States.

01:19:55 16 Q. Now, there's some additional information here to

01:19:58 17 the side. There's a hash column here with a red check.

01:20:01 18 What does that mean?

01:20:02 19 A. A hash value is created from a mathematical

01:20:08 20 equation. It can be given to any computer file. In

01:20:12 21 this particular instance the National Center for Missing

01:20:17 22 and Exploited Children along with the FBI, they have a

01:20:20 23 database of known images and videos of child

01:20:25 24 pornography. When I say known, that means we know who

01:20:27 25 the child is and a picture or video, how they were

01:20:32 1 victimized, and the circumstances of that case. What
01:20:35 2 they do is they run these files through this equation,
01:20:38 3 and it gives it a combination of letters and numbers.
01:20:42 4 That hash value identifies that file. And a database
01:20:48 5 with a hash file goes into the LimeWire program that we
01:20:51 6 use, and when it brings up the list of files, it
01:20:54 7 compares the database of hash values to known images of
01:20:58 8 videos to the list I have here. And if it matches one,
01:21:03 9 it gives it a red check mark to indicate that this file
01:21:06 10 matches one that we know who the child is.

01:21:09 11 Q. At the end here there's type; it says JPG. What
01:21:14 12 does that mean?

01:21:15 13 A. It's an image file.

01:21:16 14 Q. Farther down on the bottom of the screen capture
01:21:20 15 there's downloads. What is that? What's going on
01:21:23 16 there?

01:21:23 17 A. That is a list of files that I have downloaded up
01:21:26 18 to that point.

01:21:27 19 Q. And I put my cursor by one of the files. Which
01:21:30 20 file is that?

01:21:31 21 A. The 9YO Jennie from which I just read.

01:21:38 22 Q. And off to the side?

01:21:41 23 A. That's the size of the file; it shows 782.8
01:21:48 24 kilobytes.

01:21:49 25 Q. And status?

01:21:50 1 A. Complete.

01:21:51 2 Q. And what does that mean?

01:21:53 3 A. The file has finished downloading.

01:21:56 4 Q. And progress here?

01:21:57 5 A. It shows is 100 percent.

01:22:04 6 Q. And if I could explore here, in this collection

01:22:07 7 of files, the actual image that you downloaded, is it is

01:22:12 8 present?

01:22:13 9 A. Yes, it's called downloaded file.

01:22:17 10 Q. I'll ask you to identify that photo. Is that the

01:22:20 11 photo that you downloaded?

01:22:21 12 A. Yes, it is.

01:22:38 13 Q. I've selected another one as another example.

01:22:42 14 Anything different about that file folder than the other

01:22:50 15 file folder we just looked at?

01:22:51 16 A. It contains the same type of files, just from a

01:22:55 17 different download.

01:22:59 18 Q. And there's a PNG image here. That PNG is what?

01:23:05 19 A. A straight shot of my screen when the file

01:23:08 20 completed downloading.

01:23:11 21 Q. If I just back up for a second. At the time

01:23:13 22 you're doing this undercover session, you were

01:23:16 23 physically located where?

01:23:17 24 A. In Tulsa, Oklahoma.

01:23:18 25 Q. And the date?

01:23:20 1 A. June 22, 2010.

01:23:24 2 Q. And is this screen similar in all respects to the

01:23:29 3 other one we looked at?

01:23:30 4 A. Yes.

01:23:31 5 Q. At the top you have some search results, and at

01:23:34 6 the bottom what you're downloading?

01:23:36 7 A. Right.

01:23:36 8 Q. Then again there's a file image here. Is that

01:23:39 9 the file that you downloaded during the session?

01:23:41 10 A. Yes, it is.

01:23:44 11 Q. Is that the file that you recognize?

01:23:45 12 A. Yes.

01:24:18 13 Q. Agent Whisman, I'm handing you Government's

01:24:21 14 Exhibit 2. Do you recognize that disk?

01:24:23 15 A. Yes, I do.

01:24:24 16 Q. What is that disk?

01:24:26 17 A. It is a disk sent to me by Agent Schulte of the

01:24:30 18 Cleveland Division containing some of the pictures that

01:24:33 19 I downloaded and videos also contained in a PowerPoint

01:24:40 20 presentation.

01:24:41 21 Q. Have you had the opportunity to look at those

01:24:43 22 images on that disk?

01:24:44 23 A. Yes, I have.

01:24:45 24 Q. And are those images on that disk copies of some

01:24:48 25 of the images that you downloaded in your undercover

01:24:51 1 session?

01:24:51 2 A. Yes.

01:25:41 3 Q. Do you recognize these files?

01:25:43 4 A. Yes. They're the files from that disk.

01:25:45 5 Q. Okay. The first one here that I've highlighted,

01:25:48 6 what is that, or what type of file is that?

01:25:51 7 A. That is a video file.

01:25:53 8 Q. And then the rest of these files ending here with

01:25:58 9 downloaded file 30, what are those files?

01:26:01 10 A. Image files.

01:26:02 11 Q. And then this last document here, what is that?

01:26:06 12 A. A PowerPoint presentation.

01:26:13 13 Q. I'm going to play this movie, Agent Whisman, and

01:26:16 14 ask you to identify it after we show it to the jury.

01:26:27 15 THE COURT: We've gone a little long.

01:26:30 16 Whatever suits.

01:26:34 17 MR. CRAWFORD: Judge, I probably have another

01:26:36 18 20 minutes or so.

01:26:37 19 THE COURT: Why don't we complete him or

01:26:39 20 perhaps even adjourn for the afternoon.

01:26:57 21 (Video is played in open court.)

01:30:02 22 BY MR. CRAWFORD:

01:30:03 23 Q. Agent Whisman, you indicated there was a

01:30:05 24 presentation on this disk that is a summary of the still

01:30:08 25 images?

01:30:09 1 A. Yes.

01:30:10 2 Q. And is that this PowerPoint presentation I just

01:30:13 3 highlighted?

01:30:14 4 A. Yes, it is.

01:30:15 5 Q. And the video we just showed, is that a video you

01:30:19 6 downloaded during your undercover session?

01:30:22 7 A. Yes.

01:30:22 8 Q. I'll ask you the same about the pictures in this

01:30:25 9 slide show.

01:30:29 10 (PowerPoint presentation is shown in open court.)

01:30:29 11 BY MR. CRAWFORD:

01:32:30 12 Q. Special Agent Whisman, were those the images that

01:32:32 13 you downloaded?

01:32:33 14 A. Yes, those are some of the images I downloaded.

01:32:35 15 Q. Some of them. And all those images came from the

01:32:38 16 same IP address; is that correct?

01:32:40 17 A. Yes, they did.

01:33:40 18 Q. Agent Whisman, you were able to determine an IP

01:33:43 19 address for these images, correct?

01:33:44 20 A. Correct.

01:33:45 21 Q. What did you then do with that IP address?

01:33:47 22 A. I had an administrative subpoena issued to

01:33:51 23 Roadrunner to provide the subscriber information, who

01:33:54 24 they assigned that IP address to during the date and

01:33:58 25 times that I downloaded those files.

01:34:00 1 Q. Let me show you what's been marked as
01:34:02 2 Government's Exhibit 3. Do you recognize that document?
01:34:05 3 A. That is a subpoena that was issued for this case.
01:34:11 4 Q. And does it contain information about where you
01:34:16 5 downloaded these images from?
01:34:17 6 A. It gives the IP address along with the date and
01:34:22 7 time that the files were downloaded.
01:34:36 8 Q. Can you describe what I've highlighted there?
01:34:38 9 A. It's asking for the subscriber of the IP address
01:34:43 10 98.31.57. 201 on June 22, 2010 between 4:40 p.m. and
01:34:51 11 7:34 p.m.
01:34:52 12 Q. Were those the times of your undercover session
01:34:55 13 where you downloaded the images we just saw?
01:34:58 14 A. Correct.
01:34:58 15 Q. Did you get a response to the subpoena?
01:35:01 16 A. I did.
01:35:02 17 Q. And what did that response indicate?
01:35:05 18 A. It provided the subscriber information, and it
01:35:13 19 said that the account was subscribed to by Alex Cook,
01:35:16 20 and an address in Lima, Ohio.
01:35:18 21 Q. Let me show you what's been marked as
01:35:21 22 Government's Exhibit 4. Do you recognize that document?
01:35:23 23 A. That is the response I received.
01:35:26 24 Q. Who's it from?
01:35:27 25 A. Time Warner Cable, who's associated with

01:35:31 1 Roadrunner.

01:35:34 2 Q. And in this reference line, what's that an
01:35:37 3 indication of?

01:35:38 4 A. It's referencing the subpoena that you just
01:35:42 5 showed.

01:35:42 6 Q. And is there an IP address associated with it?

01:35:45 7 A. Yes. 98.31.57.201.

01:35:59 8 Q. What's this information?

01:36:01 9 A. That is the subscriber information.

01:36:06 10 Q. What does it indicate?

01:36:07 11 A. It indicates the name on the account is Alex Cook
01:36:10 12 with an address of 1268 Knollwood Drive, Lima, Ohio, ZIP
01:36:15 13 code 45801. Telephone number 740-507-5232. The user
01:36:24 14 name on the account is ACook60@WOH.RR.com. It shows he
01:36:35 15 pays the bill with a Visa card, and the length of
01:36:38 16 service has been active since May 6, 2010.

01:36:41 17 Q. Is that to the present?

01:36:42 18 A. To the present of that response, yes.

01:36:45 19 Q. Does that date range cover the date and time of
01:36:47 20 your undercover session?

01:36:49 21 A. Yes.

01:36:57 22 MR. CRAWFORD: Your Honor, I have no further
01:36:58 23 questions.

01:36:58 24 THE COURT: Cross-examination. How long is
01:37:00 25 your cross likely to be?

01:37:02 1 MS. KELLEY: Very brief.

01:37:07 2 THE COURT: Then we'll take a break.

01:37:08 3 Go ahead, Ms. Kelley.

01:37:08 4 - - -

01:37:08 5 RICHARD WHISMAN, CROSS-EXAMINATION

01:37:13 6 BY MS. KELLEY:

01:37:13 7 Q. Good afternoon, sir. I'm Elizabeth Kelley I
01:37:17 8 represent Alex Cook in this case.

01:37:19 9 Isn't it true that LimeWire is no longer in
01:37:22 10 business?

01:37:25 11 A. I've heard that the LimeWire company is --
01:37:28 12 something happened. I don't know what.

01:37:30 13 Q. Isn't it true that the government itself shut it
01:37:32 14 down?

01:37:33 15 A. I don't know.

01:37:33 16 Q. All right. Now, isn't it also true that people
01:37:37 17 can subscribe to LimeWire for legitimate reasons like
01:37:43 18 music sharing?

01:37:45 19 A. I don't know if music sharing is legitimate, but
01:37:49 20 you can share legitimate files with it, yes.

01:37:51 21 Q. And one can also share legitimate photos on
01:37:54 22 LimeWire as well?

01:37:55 23 A. Right.

01:37:55 24 Q. And law abiding citizens have been known to
01:38:00 25 subscribe to LimeWire; isn't that true?

01:38:03 1 A. I would assume so.

01:38:07 2 Q. Now, I want to talk a little bit about your

01:38:10 3 undercover operation. First of all, how many undercover

01:38:16 4 agents are working in Tulsa on this particular project?

01:38:20 5 A. There's two agents, and we also have part-time

01:38:24 6 task force officers from the local police departments

01:38:26 7 who work with us.

01:38:27 8 Q. And as I visualize it, your job is to basically

01:38:33 9 conduct these undercover operations, computer to

01:38:38 10 computer, correct?

01:38:39 11 A. Correct.

01:38:40 12 Q. And so when you actually make contact with an IP

01:38:48 13 address, it's that IP address that you're contacting,

01:38:52 14 correct?

01:38:52 15 A. Correct.

01:38:53 16 Q. So, for instance, you don't also have a hidden

01:38:57 17 camera hovering over that IP address, do you?

01:39:01 18 A. No.

01:39:01 19 Q. And you don't know who's actually using that IP

01:39:05 20 address at that point in time, do you?

01:39:07 21 A. No.

01:39:08 22 Q. Now, when you were conducting your undercover

01:39:20 23 operation, you basically used certain search terms,

01:39:25 24 correct?

01:39:25 25 A. Correct.

01:39:25 1 Q. And based on those search terms, materials would
01:39:30 2 come to you?

01:39:32 3 A. A list would, yes.

01:39:34 4 Q. A list would come. And when Mr. Crawford was
01:39:39 5 showing us all of those various computer screens with
01:39:43 6 that fine print and all those little sorts of things,
01:39:46 7 exclusive of the subpoena and the response from Time
01:39:51 8 Warner Cable, the name Alex Cook never appeared on those
01:39:55 9 screens, did it?

01:39:56 10 A. No.

01:39:58 11 MS. KELLEY: Could I have a moment, Your
01:39:59 12 Honor?

01:39:59 13 THE COURT: Sure.

01:40:02 14 (Discussion had off the record.)

01:40:07 15 MS. KELLEY: Thank you. No more questions.

01:40:12 16 MR. CRAWFORD: No questions, Your Honor.

01:40:13 17 THE COURT: Agent, you may step down. Do
01:40:17 18 either of you anticipate wanting to recall this agent?

01:40:20 19 MR. CRAWFORD: I don't believe so.

01:40:21 20 MS. KELLEY: I don't at this point, Your
01:40:25 21 Honor.

01:40:25 22 THE COURT: Who's your next witness?

01:40:29 23 MR. CRAWFORD: Your Honor, she's in Detroit.
01:40:31 24 She'll be here first thing tomorrow morning. We made
01:40:34 25 our best judgment about how far we would get today.

01:40:37 1 THE COURT: I understand. We seem to be
01:40:39 2 ahead of ourselves a little bit. So should we adjourn
01:40:43 3 now for the day?

01:40:44 4 MR. CRAWFORD: Your Honor, we'd be agreeable
01:40:46 5 to that.

01:40:50 6 THE COURT: Ladies and gentlemen, we are
01:40:53 7 actually ahead of the anticipated timetable, so we will
01:40:56 8 adjourn for the day. We'll resume tomorrow morning at
01:40:58 9 8:30. If you could be here by about 8:15. If for any
01:41:03 10 reason you get held up and get delayed, call the Court
01:41:08 11 and let us know. And we will all try to start promptly
01:41:10 12 and on time. As you can expect, I'm going to tell you
01:41:16 13 not to talk about the case. Don't have any contact with
01:41:19 14 anybody -- any of us who have anything to do with the
01:41:22 15 case. And keep an open mind. You've heard but a
01:41:27 16 smidgen of the evidence. There's a good bit more to
01:41:29 17 come. You have to keep an open mind throughout the
01:41:32 18 trial. Thank you again for your service, and we will
01:41:35 19 see you tomorrow morning. Safe trips home.

01:42:24 20 (Whereupon the jury was excused.)

01:42:25 21 THE COURT: What's the lineup for tomorrow
01:42:26 22 in terms of witnesses and exhibits? If you have any
01:42:29 23 objection in the anticipated testimony or exhibits,
01:42:33 24 let's try to resolve that now.

01:42:36 25 MR. CRAWFORD: Judge, we expect tomorrow to

01:42:38 1 have Amy Allen from the Department of Homeland Security
01:42:41 2 testify, Time Warner records custodian --

01:42:45 3 THE COURT: And the Homeland security will
01:42:46 4 generally testify about what?

01:42:47 5 MR. CRAWFORD: She will testify that one of
01:42:50 6 the images downloaded was an actual victim that she was
01:42:55 7 able to interview and compare with photos and testify
01:42:58 8 it's a real child.

01:43:01 9 Time Warner records custodian. We we showed
01:43:07 10 Agent Whisman the subpoena and the response. That
01:43:11 11 witness will testify to the process to which that was
01:43:13 12 created as a business record.

01:43:17 13 Judge, my understanding Elizabeth has a
01:43:19 14 witness she has to have on at 1:30.

01:43:23 15 THE COURT: We've spoken about that.

01:43:25 16 MS. KELLEY: Dr. Wayne Graves, the forensic
01:43:27 17 psychologist, must attend an out of town conference.
01:43:30 18 He needs to be on the road to the airport by 4:00. So
01:43:33 19 when we had spoken on the phone you said 1:30.

01:43:36 20 THE COURT: Whatever suits your timetable
01:43:38 21 and his, that's fine.

01:43:39 22 MS. KELLEY: That's what he's committed to
01:43:41 23 at this point, if that's still suitable.

01:43:45 24 MR. CRAWFORD: Judge, after that it would be
01:43:46 25 a series of local FBI agents beginning with Agent

01:43:50 1 Schulte.

01:43:50 2 THE COURT: Are the first witnesses likely
01:43:53 3 to take that long in the morning?

01:43:55 4 MR. CRAWFORD: No.

01:43:56 5 THE COURT: I would imagine pretty quick?

01:43:58 6 MR. CRAWFORD: Yes.

01:43:59 7 THE COURT: Then would you -- so you could
01:44:01 8 continue with the agents?

01:44:06 9 MR. SECOR: We'll just have them here.

01:44:09 10 We'll go as far as we can.

01:44:16 11 MR. CRAWFORD: Judge, I mentioned Amy Allen,
01:44:19 12 who will testify one of the images being a known victim.
01:44:22 13 We have another agent, Roy Shepherd, who will testify to
01:44:25 14 another image being a known victim. It's actually a
01:44:28 15 video. I will say that that video will not come in
01:44:31 16 until Detective Morford testifies at the end. We could
01:44:35 17 put him out of order and have him testify and come back
01:44:40 18 from the state of Washington, again with the caveat that
01:44:42 19 the evidence of where that image was, where it was found
01:44:45 20 would come in later.

01:44:46 21 THE COURT: Okay. But you can refer to it
01:44:49 22 by exhibit whatever it will be, and so forth and so on?

01:44:53 23 MR. CRAWFORD: Yes.

01:44:55 24 THE COURT: Okay. Any objection to anything
01:44:57 25 presently?

01:44:58 1 MS. KELLEY: None, Your Honor.

01:44:59 2 THE COURT: Okay. So we seem to be ahead of

01:45:03 3 schedule.

01:45:04 4 MR. SECOR: I think it's entirely possible

01:45:06 5 we'll finish our case Thursday morning.

01:45:10 6 THE COURT: If they were done by Thursday

01:45:12 7 noon, how would you prepare to go forward? What's your

01:45:16 8 timetable after that?

01:45:17 9 MS. KELLEY: We will present our witnesses

01:45:19 10 whenever the Court is ready.

01:45:21 11 THE COURT: And how long do you think their

01:45:23 12 presentation will take once you get started, except for

01:45:27 13 the fellow who's out of order.

01:45:30 14 MS. KELLEY: I only have two witnesses other

01:45:35 15 than the doctor, who I anticipate will be relatively

01:45:39 16 lengthy. The others should be short.

01:45:41 17 THE COURT: So you think we can complete the

01:45:43 18 evidence by Friday mid afternoon? What's your sense?

01:45:48 19 MS. KELLEY: It sounds like a leading

01:45:50 20 question.

01:45:50 21 THE COURT: No, it isn't. Not at all. I'm

01:45:53 22 trying to get some sense of the timetable, that's all.

01:45:55 23 MS. KELLEY: It is entirely possible.

01:45:57 24 THE COURT: I'm not a time clock judge.

01:45:59 25 MS. KELLEY: It is entirely possible.

01:46:01 1 THE COURT: If we do, let's plan to adjourn
01:46:03 2 for the weekend, and we'll go from there. Actually for
01:46:06 3 some reason there were instructions I thought I put in
01:46:09 4 there, I don't know what happened, for instance, the
01:46:12 5 instruction about not going to Twitter and outside
01:46:17 6 computer stuff and so forth. We'll check carefully.
01:46:22 7 Okeydoke. Good. Thank you. I'll see you guys in the
01:46:26 8 morning.

(Adjourned at 3:53 p.m.)

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C E B T I F T C A T E

14 I certify that the foregoing is a correct transcript
15 from the record of proceedings in the above-entitled
16 matter.

18 /s Tracy L. Spore

19 Tracy L. Spore, RMR, CRR

Date

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